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Civil Rights in the Burger Court Era

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CIVIL RIGHTS IN THE BURGER COURT ERA

THE DECADE OF the sixties was a turbulent one. It began in a spirit of hope. In the midst of a period of sustained prosperity, John Kennedy created the Peace Corps, Lyndon Johnson launched his Great Society, and Congress passed the Civil Rights Act of 1964 so that everyone could participate in the good life. Under Earl Warren the United States Supreme Court complemented the liberal legislation by championing the rights of the individual who had been neglected by the mainstream of society—the criminal suspect, the member of a minority group, and the poor. But the dream was not fulfilled, and the decade ended in a spirit of discontent and frustration manifested by the presence of the hippies, the yippies, the sit-ins, crises in the ghettos, discord over the Vietnam War, resentment over escalating welfare costs, disrespect for authority, and an ever-increasing crime rate.

When Richard Nixon ran for the presidency in 1968, he was aware that a good number of people hadn't been heard from amidst all the clamor, and he conducted a campaign calculated to appeal to conservatives and what he termed "the silent majority."[1] These people had worked hard to achieve whatever they had and were concerned over the loose lifestyles of the young, the threat of criminals who might take away what they had earned, and welfare cheaters who were able to get something for nothing.[2] Many blamed the United States Supreme Court for the distressing state of affairs, and in an effort to capture their votes, candidate Nixon promised to appoint to the Supreme Court "strict constructionists" who would represent the side of "law and order".[3]

True to his word, President Nixon appointed men who shared his conservative philosophy and who were not likely to hamstring "the peace forces in our society . . . by setting free patently guilty individuals on the basis of legal technicalities."[4] Early in his presidency Nixon selected Warren Burger to replace retiring Chief Justice Earl Warren. Burger, like Nixon, grew up in a family of meager means and climbed the ladder to success by sheer hard work.[5] Moreover, his views on law and order were compatible with Nixon's. Burger's views were delineated in an address he gave at Ripon College in 1967, where he stated:

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[1] L. LURIE, THE RUNNING OF RICHARD NIXON 298 (1972); J. MCGUINESS, THE SELLING OF THE PRESIDENT 9-23, 240-41, 242-43 (1969); J. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA 6 (1973); J. WITCOVER, THE RESURRECTION OF RICHARD NIXON 364 (1970).

[2] LURIE, *supra* note 1, at 317; WITCOVER, *supra* note 1, at 461.

[3] SIMON, *supra* note 1, at 8. By the term "strict constructionist" Nixon meant a person who would not attempt to promote social reform through the courts. *Id.*

[4] *Id.* at 7.

[5] *Id.* at 76.

> Governments exist chiefly to foster the rights and interests of their citizens—to protect their homes and property, their persons and their lives. If a government fails in this basic duty, it is not redeemed by providing the most perfect system for the protection of the rights of defendants in the criminal courts.[6]

The next appointment, Harry Blackmun, had been a boyhood friend of Warren Burger and grew up only a few blocks away from him. Like Burger, Blackmun preferred to rely on judicial precedent rather than to break new ground.[7]

Lewis Powell, the third appointee, came from a prestigious southern family.[8] Although he did not share the poor beginnings of Nixon, Burger and Blackmun, he was well known as a political conservative who decried extra-legal pressures for reform, such as demonstrations and sit-ins.[9] He also believed that the Warren Court had gone too far in according protections to the criminal suspect. Writing as president of the American Bar Association, he stated:

> [T]he immediate problem is one of balance. While the safeguards of fair trial must surely be preserved, the right of society in general and of each individual in particular to be protected from crime must never be subordinated to other rights. There is a growing opinion that an imbalance does exist, and that the rights of law abiding citizens have been subordinated.[10]

Nixon filled a fourth vacancy on the Court with William Rehnquist. As an assistant attorney general in the Nixon administration, Rehnquist had criticized many of the Warren Court decisions, defended the surveillance policies of the Justice Department, and approved the actions of the District of Columbia police when they arrested thousands of demonstrators on May Day, 1971.[11]

Nixon's four appointments[12] may be labelled as politically conservative, but they by no means have been inactive. Their backgrounds and personal philosophies have shaped their decisions just as surely as did those of the members of the Warren Court. The dissimilarities in the decisions of the

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[6] *Id.* at 74.

[7] *Id.* at 143.

[8] *Id.* at 243.

[9] *Id.* at 244.

[10] Powell, *An Urgent Need: More Effective Criminal Justice*, 51 A.B.A.J. 437, 439 (1965).

[11] SIMON, *supra* note 1, at 234-35.

[12] President Ford has since appointed John Paul Stevens to fill the seat of retiring Justice Douglas. Justice Stevens has not been mentioned here because he has so far participated in very few Court decisions. However, it looks as though he will be at least as conservative as the Nixon appointees. *See* Doyle v. Ohio, 96 S.Ct. 2240, 2246 (1976) (Stevens, J., dissenting).

two Courts may in part be reflective of the vastly different goals each Court has pursued. Generally, while the Warren Court protected the underdog and sought to create a more just society, the Burger Court has sought to promote order, to allow law enforcement officials a wide area of permissible behavior in their efforts to combat crime, and to protect "traditional" middle-class values. There has been a notable lack of sympathy for those on the fringes of our society.

I. THE RECORD OF THE BURGER COURT

Since Warren Burger became Chief Justice of the Supreme Court of the United States seven years ago, the new tenor of the Court has been evidenced in numerous areas ranging from abortion[13] to zoning.[14] They cannot all be considered here, but three areas—the rights of criminal suspects, minority groups and the poor—have been selected as representative of the Court's tendency to constrict the individual rights that were seen as so important to the Warren Court. This section will focus on the holdings of the Court's decisions rather than on their underlying constitutional analysis, because it is largely the unfavorable results that have provoked the state courts to decide questions involving individual rights on state grounds, in order to avoid review by the Supreme Court. The various techniques that the state courts have been using are discussed in the second section of this comment.

A. *The Rights of Criminal Suspects*

The Nixon appointees, aided by Justice White and sometimes Justice Stewart, have sought to assist law enforcement officials in the apprehension and conviction of criminals by enlarging the standards of permissible police conduct in the performance of their duties.[15] Assuming that the rights of the criminal suspect are directly related to restraints that are put on the police and prosecutors, those rights have been diminished to the extent that

[13] *E.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[14] *E.g.*, Young v. American Mini Theatres, Inc., 96 S. Ct. 2440 (1976) (Municipality may control location of theaters as well as other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city); City of Eastlake v. Forest City Enterprises, Inc., 96 S.Ct. 2358 (1976) (mandatory referendum on zoning proposal not an unlawful delegation of legislative power); Warth v. Seldin, 422 U.S. 490 (1975) (complaint alleging that town ordinance, by its terms and as enforced, effectively excluded persons of low income from living in the town in contravention of the First, Ninth, and Fourteenth Amendments as well as 42 U.S.C. §§1981, 1982, and 1983, dismissed due to lack of standing); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), (local zoning ordinance which restricts land use to "single-family dwellings" may be defined to exclude groups of three or more unreleated persons).

[15] *See, e.g.*, United States v. Watson, 96 S.Ct. 820, 827-28 (1976) (preferable to allow warrantless arrest than to "encumber criminal prosecutions with endless litigation"); Michigan v. Tucker, 417 U.S. 433, 446 (1974) (pressures of law enforcement make it unrealistic to expect police to make no errors whatsoever); United States v. Russell, 411 U.S. 423, 436 (1973) (entrapment justified because "there are circumstances when the use of deceit is the only practicable law enforcement technique available").

standards of due process have been lowered,[16] right to counsel has been denied,[17] and evidence[18] or statements[19] made by the defendant obtained through questionable police tactics have been permitted into the courtroom to help in securing a conviction. Although it would be erroneous to say that the Burger Court has sided with the prosecutors in every instance,[20] the trend of the decisions has been to undo or limit much of what occurred in the field of criminal procedure under the guidance of Chief Justice Earl Warren. To illustrate the vivid contrast between the two Courts, their differing attitudes on acceptable police behavior during interrogation of a suspect will be examined.

The Warren Court dealt with the interrogation setting in *Miranda v. Arizona*.[21] There, the Court laid down detailed requirements for both law enforcement officials and courts:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the

[16] *See, e.g.*, United States v. Miller, 96 S.Ct. 1619 (1976) (prosecutor entitled to records of banking transactions merely upon request); Paul v. Davis, 96 S.Ct. 1155 (1976) (police who distributed pamphlet listing suspect, who had never been tried for alleged offense, as an "active shoplifter" did not infringe on liberty or property interest so as to invoke procedural protection of the Due Process Clause); United States v. Watson, 96 S.Ct. 820 (1976) (warrant not necessary to effect an arrest, even in the absence of exigent circumstances). *But see* United States v. United States District Court, 407 U.S. 297 (1972) (electronic surveillance to be conducted in domestic security cases only with a warrant).

[17] *See, e.g.*, Middendorf v. Henry, 96 S.Ct. 1281 (1976) (trial by summary court martial in the armed services does not require presence of lawyer for the accused); United States v. Ash, 413 U.S. 300 (1973) (presence of counsel not required when prosecution witnesses select picture of accused from photographic array); Kirby v. Illinois, 406 U.S. 682 (1972) (counsel not required at station showup that takes place after arrest but before indictment). *But see* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel exists when suspect arrested for misdemeanor for which prison sentence is possible).

[18] *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest is justified even if there was no probable cause that weapons or evidence would be found on arrestee's person); Schneckcloth v. Bustamonte, 412 U.S. 218 (1973) (evidence admissible on basis of consent even though defendant not told he had a right to refuse consent).

[19] *See, e.g.*, Beckwith v. United States, 96 S.Ct. 1612 (1976) (incriminating statements made to Internal Revenue agent in suspect's home held to be admissible); Michigan v. Mosley, 96 S.Ct. 321 (1975) (statements made in second round of questioning, after suspect had indicated that he did not wish to answer any more questions, were admissible); Oregon v. Hass, 420 U.S. 714 (1975) (statements made after suspect expressed desire to consult with attorney held admissible); Harris v. New York, 401 U.S. 222 (1971) (statements made in absence of *Miranda* warnings may be used to impeach defendant's credibility).

[20] *See, e.g.*, Doyle v. Ohio, 96 S.Ct. 2240 (1976) (impermissible to use post-arrest silence after receipt of *Miranda* warnings for impeachment purposes); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process requires opportunity to be heard before parole revocation); United States v. United States District Court, 407 U.S. 297 (1972) (warantless electronic surveillance prohibited in domestic security cases); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases which carry possible prison sentence); Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel bars prosecutor from presenting same evidence to a second jury once defendant has been acquitted).

[21] 384 U.S. 436 (1966).

> privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[22]

These constitutional requirements were spelled out early in the opinion and were the result of many cases that the Court had considered; they were by no means limited to the specific facts in the four cases that were the object of the Court's immediate attention.[23] While the Miranda guidelines were fashioned to insure that "admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth," the privilege against self-incrimination has been stated by the Court to have also the purpose of "prevent[ing] the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."[24]

The fact that the Court meant these principles to be applied broadly was evidenced in later cases. Although the Court declined to enforce the standards retroactively because it feared the wholesale release of convicted criminals,[25] it used them as guideposts to determine the voluntariness of statements made before *Miranda* went into effect.[26]

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[22] *Id.* at 444-45.

[23] Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1210 (1971) [hereinafter cited as Dershowitz & Ely].

[24] *In re* Gault, 387 U.S. 1, 47 (1967), *citing* Miranda v. Arizona, 384 U.S. 436 (1966) .

[25] Johnson v. New Jersey, 384 U.S. 719 (1966).

[26] *See, e.g., In re* Gault, 387 U.S. 1 (1967); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

Harrison v. United States[27] reinforced *Miranda* by holding that later statements resulting from an illegally procured confession were tainted, and therefore just as inadmissible as the confession itself. In *Harrison* the defendant's first conviction was reversed because confessions procured in violation of the *Miranda* rules had been admitted at his trial. During the trial he had taken the stand in an attempt to rebut the damaging evidence. Upon retrial, this testimony was read to the jury. The Supreme Court reversed his second conviction because the testimony at his first trial resulted from the inadmissible confessions, and thus violated the privilege against self-incrimination.[28]

Since the *Miranda* opinion continually stressed the inherent coerciveness of custodial interrogation, the Warren Court later attempted to close a potential loophole by twice giving a broad interpretation to the term "in custody". In *Mathis v. United States,*[29] a prisoner in a state penitentiary was questioned by an Internal Revenue investigator about his tax returns. The Court held that *Miranda* was applicable, even though the individual who was interrogated had not been put in jail by the officers questioning him, but was there for an entirely separate offense.[30] Also, a person need not actually be in prison or at the stationhouse to be "in custody". The fact that he has been deprived of his freedom of action is sufficient. In *Orozco v. Texas,*[31] the Court reversed a conviction based on an admission that the defendant made in his bedroom while being questioned there by police officers. Even though the suspect was in familiar surroundings, the Court held that the *Miranda* warnings were necessary because the officers had considered him under arrest from the beginning.

The consistency of the decisions seemed to give the *Miranda* philosophy a firmly entrenched place in the law. But the cases were extremely controversial,[32] and, more importantly, were often closely decided.[33] Since a single

[27] 392 U.S. 219 (1968).

[28] The holding is similar to, but not identical with, the "fruit of the poisonous tree" doctrine first enunciated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), in regard to evidence obtained as a result of a prior violation of the search and seizure rules developed under the Fourth Amendment. *Harrison* involved only the use of a defendant's own statements made as a result of his prior inadmissible statements. For differing approaches governing the case where other evidence is uncovered as a result of the inadmissible statements, compare Wong Sun v. United States, 371 U.S. 471 (1963), with Michigan v. Tucker, 417 U.S. 433 (1974).

[29] 391 U.S. 1 (1968).

[30] *Id.* at 3-5.

[31] 394 U.S. 324 (1969). *Accord,* Miranda v. Arizona, 384 U.S. 436, 478 (1966), wherein the Court stated, "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."

[32] In favor of *Miranda* and related decisions: Hayes, *Common Fallacies in Criticism of Recent Court Decisions on Rights of Accused,* 53 A.B.A.J. 425 (1967); McCullough, *Balancing the Rights of the Accused and the Public in Constitutional Probity,* 54 A.B.A.J. 273 (1968). Against: Gutman, *The Criminal Gets the Breaks,* N.Y. Times, Nov. 29, 1964, §6

vote on the Warren Court often made a crucial difference, the Burger Court was able to weaken and limit *Miranda* even before all four Nixon appointees were sitting on the Court.

In 1971, *Harris v. New York*[34] provided the vehicle for the first cutback. In that case, the defendant was arrested for selling heroin on two separate occasions. At his trial he took the stand on his own behalf and denied his guilt. The prosecutor sought to destroy his credibility by pointing out inconsistencies between his testimony and statements he had made to the police immediately following his arrest. When his case reached the Supreme Court, Chief Justice Burger, joined by Justices Blackmun, White, Stewart and Harlan, ruled that although the statements were not admissible for the prosecution's case-in-chief (because they were obtained in violation of *Miranda*); they were available, however, for the purpose of impeaching the defendant's testimony. The majority justified the decision on the basis that the privilege against self-incrimination "cannot be construed to include the right to commit perjury."[35]

In their eagerness to put things back in order, the majority not only

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(Magazine), at 36; Hall, *Judicial Rule-Making is Alive But Ailing*, 55 A.B.A.J. 637, 639 (1969); Miller, *Balancing the Rights of the Accused and the Public*, 53 A.B.A.J. 1046 (1967). For coverage of the public and press reaction to *Miranda*, see N.Y. Times, June 19, 1966, §4, at 13.

Nixon, of course, capitalized politically on the negative feelings generated by the *Miranda* decision in his 1968 campaign. LURIE, *supra* note 1, at 298; MCGUINNISS, *supra* note 1, at 9-23; SIMON, *supra* note 1, at 6-7. However, it should be noted that Miranda himself, who was the cause of all the uproar, was reconvicted on his retrial without the use of his confession, and his conviction was affirmed by the Supreme Court of Arizona. State v. Miranda, 104 Ariz. 174, 450 P.2d 364 (1969). He remained in custody during the time that his legal status was being determined. McCullough, *supra*, at 275. Moreover, the Warren Court was not completely insensitive to the needs of law enforcement officials. It declined to apply *Miranda* retroactively because to do so "would seriously disrupt the administration of our criminal laws." Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

[33] Justices Harlan, White and Stewart, hold-overs from the Warren Court, were often opposed to the more controversial decisions that were handed down when Earl Warren was leading the Court. *See, e.g.*, Orozco v. Texas, 394 U.S. 324 (1969) (statements made to the police by the accused in his own bedroom in the absence of *Miranda* warnings were inadmissible even though suspect was in familiar surroundings) (a 5-1-2 decision); Harrison v. United States, 392 U.S. 219 (1968) (testimony at first trial which resulted from illegally procured confession was inadmissible at second trial) (a 7-2 decision); Garrity v. New Jersey, 385 U.S. 493 (1967) (choice given to policemen to incriminate themselves or to be dismissed constituted coercion) (a 5-4 decision); Spevack v. Klein, 385 U.S. 511 (1967) (choice given to lawyer to testify at disciplinary proceeding or be disbarred constituted coercion) (a 4-1-4 decision); Miranda v. Arizona, 384 U.S. 436 (1966) (a 5-4 decision); Escobedo v. Illinois, 378 U.S. 478 (1964) (denial of right to counsel) (a 5-4 decision); Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained without search warrant inadmissible) (a 5-4 decision).

[34] 401 U.S. 222 (1971).

[35] *Id.* at 225, *citing* Walder v. United States, 347 U.S. 62 (1954). *See also* United States v. Knox, 396 U.S. 77 (1969).

brushed over *Miranda*,[36] they also distorted the facts of the *Harris* case. Although they stated that the defendant made no claim that his exculpatory statements were either coerced or involuntary,[37] the record appears to show the contrary.[38] Moreover, the *Harris* rule cannot be justified by a fear of encouraging perjury.

> The fact that the defendant at trial makes statements inconsistent with prior statements made to the police does not demonstrate that his testimony is perjured. Prior inconsistent statements may often be harmonized or explained. If the statements are irreconcible it may indicate that the prior statement was false rather than the latter, a realistic possibility where the prior statement was made under the subtly coercive circumstances of the station house interrogation. Nor does *Miranda* bar the prosecutor from exploring the defendant's credibility. It leaves him all the traditional tools for unmasking falsehood, requiring only that he use fair and legal methods rather than ones which are rooted in official misconduct.[39]

Since *Harris* can be justified neither by judicial precedent nor by its stated rationale, the holding simply reflects a dissatisfaction with the *Miranda* principles.[40] This becomes more evident when one realizes the effect *Harris* has on *Miranda*. What the *Harris* rule accomplishes is to admit through the "back door" of cross-examination statements made to the police in the absence of *Miranda* warnings; the suspect is protected only if he does not

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[36] "[A] pervasive and unambiguous aspect of *Miranda* was its explicit rejection of distinctions based on the manner in which a statement is used by the government or the degree to which it is helpful to it." Dershowitz & Ely, *supra* note 23, at 1209. Moreover, the Court seems to have deliberately distorted Walder v. United States, 374 U.S. 62 (1954), upon which it *did* rely. *Id.* at 1213.

[37] 401 U.S. at 224.

[38] Dershowitz & Ely, *supra* note 23, at 1201.

[39] State v. Miller, 67 N.J. 229, 241, 337 A.2d 36, 43 (1975) (following rule of Harris v. New York) (Pashman, J., dissenting).

[40] This opinion is further buttressed by the fact that the Burger Court has carefully confined the *Miranda* principles to its setting, *i.e.*, custodial interrogation. For instance, in Kirby v. Illinois, 406 U.S. 682 (1972), the Court declined to find any violation of an accused's rights in a case where a prosecution witness identified the supposed culprit at a pre-indictment police station showup. The suspect had not been notified of his right to counsel despite the fact that such showups are "particularly fraught with the peril of mistaken identification." *Id.* at 699-700 (Brennan, J., dissenting). This decision not only obviously violates the spirit of *Miranda*, which sought to insure that unfair police tactics are not used, and that pre-trial activity is correctly reported at trial, 384 U.S. at 470 (1966), but it also represents another case where the Burger Court has eviscerated precedent without overruling it. To reach its result, the Court unconvincingly distinguished United States v. Wade, 388 U.S. 218 (1967), a Warren Court decision which held that an accused has a right to counsel at a lineup occurring after indictment. *Wade* was not controlling in *Kirby*, the Court said, because the showup in *Kirby* occurred prior to indictment (i.e., the onset of adversarial judicial proceedings), while in *Wade*, the identification confrontation took place after indictment. The effect of the decision means that the police can easily avoid *Wade* simply by conducting identification procedures before indictment rather than later. Kirby v. Illinois, 406 U.S. 682, 699 n.8 (1972) (Brennan, J., dissenting).

testify at his own trial,[41] often the only means available to defeat the criminal charge against him. Even if he refuses to take the stand, it is highly unlikely that the prosecution will fail as a result of the bar against using the statement as part of the case-in-chief. Rarely does a prima facie case require "corroboration from the lips of the accused."[42] Since the police have little to lose and everything to gain, there is no longer any incentive for them to heed the *Miranda* rules.[43]

Although *Harris* represented the most dramatic and serious wounding of the *Miranda* decision,[44] the Burger Court has not been content to rest there. Later cases have continued to erode any effectiveness it might have in excluding statements from the prosecution's case-in-chief.

An obvious way to limit *Miranda* is to limit the scope of "custodial interrogation." The Burger Court did precisely that in *Beckwith v. United States*,[45] a case where the defendant was interviewed in his home by Internal Revenue agents during the course of a criminal tax investigation. To require warnings in such a situation, where the agents had clearly focused their investigation on the taxpayer, would prevent abuses even if he had not yet been arrested, but the Court held that incriminating statements that the defendant made in the absence of full *Miranda* warnings were admissible. The rationale was that the taxpayer was in familiar surroundings; therefore, presumably not subject to the intense psychological pressure that naturally occurs when one is cut off from the outside world.[46]

In coming to this conclusion, the Court disregarded the spirit of *Miranda*. The *Miranda* opinion did focus on the inherent coerciveness of the police interrogation room.[47] Moreover, while *Miranda* was very specific in setting forth guidelines for the police to follow, it was rather vague in determining

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[41] Harris v. New York, 401 U.S. 222, 229-30 (1971) (Brennan, J., dissenting). *But cf.* Doyle v. Ohio, 96 S.Ct. 2240 (1976), wherein the Court held that the use for impeachment purposes of an arrestee's silence at the time of arrest and after he received *Miranda* warnings violated the due process clause of the Fourteenth Amendment. The Court stated: "Silence in the wake of these warnings may be nothing more than the arestee's exercise of . . . [his] *Miranda* rights. Thus, every post-arrest silence is insoluably ambiguous because of what the State is required to advise the person arrested." *Id.* at 2244.

[42] Riddell v. Rhay, 404 U.S. 974 (1971) (Brennan, J., dissenting).

[43] *Id.* at 976.

[44] *See, e.g.*, Dershowitz & Ely, *supra* note 23; Meachum, *Admitting the Inadmissible: The Wounding of Miranda*, 23 BAYLOR L. REV. 639 (1971).

[45] 96 S.Ct. 1612 (1976).

[46] *Compare* Beckwith v. United States, 96 S.Ct. 1612 (1976), *with* the Warren Court decision of Orozco v. Texas, 394 U.S. 324 (1969) (statements made by accused in his own bedroom in the absence of *Miranda* warnings were inadmissible since his freedom of movement had been curtailed).

[47] United States v. Oliver, 505 F.2d 301, 304 (7th Cir. 1974).

at what point in the investigation the guidelines were required.[48] What *Beckwith* ignores is that *Miranda* "differentiates between the questioning of a mere witness and the interrogation of an accused for the purpose of securing his conviction"[49] and that the guidelines outlined in *Miranda* were supposed to go into effect when "the investigative machinery of the government is directed toward the ultimate conviction of a particular individual."[50] Certainly in *Beckwith* the government had focused on past conduct of the taxpayer and was interested in securing his conviction. The fact that he very well could have misunderstood the nature of the inquiry, his obligation to respond to questions, and the consequences of doing so created psychological pressure compelling response to the questions akin to that described in *Miranda.*[51]

Other cases have weakened *Miranda* more directly by watering down its guidelines. For instance, *Miranda* specifically required that a suspect be informed that he has the right to have counsel present during interrogation and, if he cannot afford one, that the state will appoint a lawyer to represent him.[52] The Burger Court, however, ignored that part of the holding in *Michigan v. Tucker.*[53] There, the defendant was advised of all his rights except that he had a right to the appointment of counsel if he were indigent. He proceeded with the interrogation without the help of an attorney and told the police that he had been with a friend at the time of the crime in question. Naturally, the police then questioned the friend. The friend's testimony, which tended to establish the defendant's guilt rather than to exonerate him, was held to be admissible because the defendant's statement was voluntary[54]

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[48] Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona,* 14 U.C.L.A. L. REV. 59, 63 (1966).

[49] Beckwith v. United States, 96 S. Ct. 1612, 1618 (1976) (Brennan, J., dissenting), *quoting* United States v. Oliver, 505 F.2d 301, 304-05 (7th Cir. 1974).

[50] 96 S. Ct. at 1618 (Brennan, J., dissenting). The opinion of the majority, however, states: "*Miranda* specifically defined 'focus,' for its purposes, as 'questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom in any significant way,'." *Id.* at 1616, *quoting* 384 U.S. 436, 444 (1966) (emphasis supplied by *Beckwith* Court).

[51] 96 S. Ct. at 1617-18 (Brennan, J., dissenting).

[52] "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege [against self-incrimination]." Miranda v. Arizona, 384 U.S. 436, 469 (1966).

> In order fully to apprise a person interrogated of the extent of his rights . . . it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or the funds to obtain one. . . . *Id.* at 473.

[53] 417 U.S. 433 (1974).

[54] The Court found no need to decide whether the defendant's statements themselves were admissible because the trial court did not permit them to be introduced. In this regard, note that the Court justified the decision because the interrogation ". . . involved no compulsion

and the policemen had acted in good faith; therefore, the Court believed that the sanction of excluding the friend's testimony would serve no useful purpose.[55]

Although *Miranda* permits a defendant to waive his right against self incrimination, it clearly requires that police interrogation must cease promptly if the suspect indicates either that he wishes to consult with an attorney or remain silent.[56] In *Oregon v. Hass,*[57] an arrestee expressed a desire to telephone his attorney. The police officer who had him in custody said that he could do so as soon as they got to the police station. Before they arrived, and after continued questioning, the suspect made incriminating statements that were later used at his trial. The Supreme Court of Oregon ruled that the statements were inadmissible for any purpose,[58] but the Burger Court reversed, holding that the statements were available to the state for impeachment purposes.

Michigan v. Mosley,[59] a similar case, involved a suspect who had been taken into custody and interrogated about a robbery. When the suspect indicated that he did not wish to answer any more questions, the interrogation ceased temporarily. Two hours later, however, a second investigator started questioning the same suspect about another crime for which he was under suspicion. During the second round of interrogation, the suspect confessed to the robbery. As in *Hass,* the state court followed *Miranda* and ruled that the confession was inadmissible.[60] Again, the United States Supreme Court

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sufficient to breach the right against compulsory self-incrimination." 417 U.S. at 443. The Court may have been implying that a determination of voluntariness is sufficient to find the statement or its "fruits" admissible, and that the *Miranda* rules are no longer mandatory. This opinion is given further support by the fact that Pennsylvania v. Romberger, 417 U.S. 964 (1974), a case which involved the question of the admissibility of the statements themselves, was remanded to the state supreme court for reconsideration in light of the *Tucker* decision. For further indications that *Miranda* is no longer viable, see note 66 and text accompanying note 67 *infra.*

[55] The Warren Court almost reached a contrary conclusion in Harrison v. United States, 392 U.S. 219 (1968). *See* note 28 and accompanying text *supra.* Note also that this treatment of the "fruit" of a confession is treated differently from the "fruit" of an illegal search and seizure, exclusion of which *has* been found mandatory. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Pitler, *The Fruit of the Poisonous Tree Revisited and Shepardized,* 56 CAL. L. REV. 579 (1968). However, these positions may be harmonized in the future; the Burger Court may be moving toward a renunciation of the exclusionary rule in regard to illegally seized evidence and its fruits. *See* Stone v. Powell, 96 S.Ct. 3037, 3052 (1976) (Burger, C.J., concurring).

[56] 384 U.S. at 474. *See* text accompanying note 22 *supra.*

[57] 420 U.S. 714 (1975).

[58] State v. Hass, 267 Ore. 489, 517 P.2d 671 (1973), relying upon pre-*Harris* Oregon case and distinguishing *Harris.*

[59] 423 U.S. 96 (1975).

[60] People v. Mosley, 51 Mich. App. 105, 214 N.W.2d 564 (1974).

reversed. It evaded *Miranda's* proscriptions by claiming that *Miranda* did not state under "what circumstances, if any, a resumption of questioning is permissible."[61]

In arriving at its holding, the Court in *Mosely* distinguished *Westover v. United States,*[62] one of *Miranda's* companion cases, which dealt with a similar situation. In *Westover,* the defendant was questioned by the FBI immediately after being questioned by state authorities, who did not give advisory warnings. A confession was elicited during the second round of questioning. The FBI had given the required warnings, but the defendant's waiver was held to be ineffective because he had not been given warnings before any questioning was commenced. However, in dictum, the Court in *Westover,* indicated that "a different case would be presented if an accused were taken into custody by a second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them."[63] Contrary to the Burger Court's opinion, *Mosley* was not the "different case". The majority opinion in *Mosley* indicated that a different location was involved,[64] but since "different location" here meant only a different floor of the same building, a different result is hardly justified.[65] The decision can perhaps be best explained by the Court's hint that the States may have had a fair chance of having *Miranda* overruled, and finally put to rest, if a good argument had been made.[66]

As criminals are generally unpopular folk, few may mourn the admission of a suspect confession at a trial. Policemen investigating serious crimes are under tremendous pressure,[67] and it doesn't seem just to let a criminal go free because the policeman has made an error. But the rules were not formulated to protect criminals; they were formulated:

> to protect all persons, whether suspected of crime or not, from abuse by the government of its powers of investigation, arrest, trial and

[61] Michigan v. Mosley, 423 U.S. 96, 101 (1975). The Court stated that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored'." *Id.* at 104.

[62] 384 U.S. 436 (1966).

[63] *Id.* at 496-97 (emphasis added).

[64] 423 U.S. at 104.

[65] *Id.* at 119 n. 7 (Brennan, J., dissenting).

[66] The Court indicated its dissatisfaction with *Miranda* by stating,

> Neither party in the present case challenges the continuing validity of the *Miranda* decision, nor of any of the so-called guidelines it established to protect what the Court there said was a person's constitutional privilege against self-incrimination. *Id.* at 100.

Justice Brennan believes that Miranda will ultimately be overruled. *Id.* at 112 (Brennan, J., dissenting).

[67] Because of the pressures of law enforcement, "the law . . . cannot realistically require that policemen investigating serious crimes make no errors whatsoever." Michigan v. Tucker, 417 U.S. 433, 446 (1974).

> punishment. It was not solicitude for persons accused of crime but the desire to maintain the proper balance between government and the persons governed that gave rise to the adoption of these constitutional provisions.[68]

If the Supreme Court is willing to countenance less meticulous standards for the conduct of the police, the law-abiding citizen, as well as the criminal, will be affected.

B. *Advancement of Minority Groups*

There can hardly be any doubt that blacks made more advances toward true equality during the years of the Warren Court than they did during any other equivalent period of time since the Civil War and the passage of the Thirteenth, Fourteenth and Fifteenth Amendments. Not only was the Civil Rights Act of 1964[69] passed during that period, but the Supreme Court ruled in their favor in many of the numerous cases concerning them.[70] In Earl Warren's first term, the landmark decision of *Brown v. Board of Education,*[71] which declared that the "separate but equal" doctrine had no place in the field of public education, was handed down. In requiring that public schools henceforth be racially integrated, the Court considered the effect of segregation on the hearts and minds of minority children.

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of the benefits they would receive in a racial[ly] integrated school system.[72]

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[68] Baxter v. Palmigiano, 96 S.Ct. 1551, 1566 (1976) (Brennan, J., concurring in part and dissenting in part), *quoting* Ratner, *Consequences of Exercising the Privilege Against Self Incrimination,* 24 U. CHI. L. REV. 472, 484 (1957).

[69] 42 U.S.C. §2000 (1971).

[70] Exceptions include Walker v. City of Birmingham, 388 U.S. 307 (1967) (civil rights advocates who flout temporary injunction against assembling without permit may be punished for contempt); Adderly v. Florida, 385 U.S. 39 (1966) (narrowly drawn state trespass statute was enforceable against peaceable student demonstrators refusing to leave county jail grounds after warning); Lassiter v. Board of Elections, 360 U.S. 45, 53-54 (1959) (statutory literacy test that voter "be able to read and write any section of the Constitution of North Carolina in the English language" did not conflict with the Fourteenth Amendment); Shuttlesworth v. Board of Education, 358 U.S. 101 (1958) (Alabama's school placement law was not unconstitutional on its face).

[71] 347 U.S. 483 (1954).

[72] *Id.* at 494.

The next year the Court required segregated school systems to proceed with integration with "all deliberate speed."[73]

The Court held firm to its mandate of desegregation. When "all deliberate speed" proved more deliberate than speedy, the Court ordered immediate integration.[74] And when resistant school systems attempted to evade the Court's prescription, the Court saw through the ruses and ordered them to dismantle their dual systems.[75] The integration of teaching and administrative personnel was also required.[76]

Blacks also gained entrance into other formerly segregated areas, including public bathing beaches and recreational facilities,[77] intrastate busses,[78] athletic contests,[79] municipal parks,[80] restaurants,[81] courtrooms,[82] prisons,[83] motels,[84] and commercial establishments that attempted to disguise themselves as "private clubs".[85] Since state laws requiring segregation of such areas were declared unconstitutional, it followed that criminal trespass laws or other such sanctions were also unconstiutional and could not be enforced

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[73] Brown v. Board of Education, 349 U.S. 294 (1955).

[74] Rogers v. Paul, 382 U.S. 198 (1965). The Court never permitted any delay in admission to institutions of higher learning. *See* Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413 (1958); Lucy v. Adams, 350 U.S. 1 (1955).

[75] *See, e.g.,* Green v. School Board, 391 U.S. 430 (1968) ("freedom of choice" plan, which in operation merely preserved pattern of racially segregated schools); Griffiin v. School Board, 377 U.S. 218 (1964) (county system of private schools, aided by public tuition grants); Goss v. Board of Education, 373 U.S. 683 (1963) (provisions of one-way transfer plan which permitted student to transfer to school where he would be in racial majority); Cooper v. Aaron, 358 U.S. 1 (1958) (integration plan suspended because governor of state ordered National Guard to prevent Negro students from entering school to prevent possible disorder).

[76] United States v. Board of Education, 395 U.S. 225 (1969).

[77] Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches), *aff'g per curiam* 220 F.2d 386 (4th Cir. 1955).

[78] Gayle v. Browder, 352 U.S. 903 (1956), *aff'g per curiam* 142 F. Supp. 707 (M.D. Ala. 1956).

[79] Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959), *aff'g per curiam* 168 F. Supp. 149 (E.D. La. 1958).

[80] Watson v. City of Memphis, 373 U.S. 526 (1963); New Orleans City Park Improvement Ass'n v. Deteige, 358 U.S. 54 (1958), *aff'g per curiam* 252 F.2d 122 (5th Cir. 1958).

[81] Turner v. Memphis, 369 U.S. 350 (1962) (restaurant and rest rooms in municipal airport); Burton v. Parking Authority, 365 U.S. 715 (1961) (restaurant operated by private owner under lease in building financed by public funds); Boynton v. Virginia, 364 U.S. 454 (1960) (restaurant in bus terminal).

[82] Johnson v. Virginia, 373 U.S. 61 (1963).

[83] Lee v. Washington, 390 U.S. 333 (1968).

[84] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (sustaining the public accommodation provisions of the Civil Rights Act of 1964).

[85] Daniel v. Paul, 395 U.S. 298 (1969) ("private club" that advertised and charged white members only 25¢ for annual membership).

against a Negro who dared to ignore them.[86] Nor could the black activist groups be stopped from "promoting litigation" by advising blacks that their rights had been infringed.[87]

Perhaps even more basic to the pursuit of personal happiness is the right to manage's one's own home life without undue restrictions. The Warren Court gave blacks a wider range for personal choices by prohibiting any discrimination, either by state law[88] or by private conduct,[89] in the sale, rental, or lease of real property. It also struck down state laws making it a crime for blacks and whites of the opposite sex to co-habit.[90]

Lastly, the Warren Court accorded the Negro his full civic rights and responsibilities. It banned any discrimination against the minority member in the voting booth, either as a voter[91] or as a candidate,[92] and whether by

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[86] *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (effect of Civil Rights Act was to abate pending state trespass and related prosecutions for sit-ins and other peaceful activities in assertion of rights protected by the Act); Wright v. Georgia, 373 U.S. 284 (1963) (blacks who were only playing basketball could not be convicted of breach of the peace for refusal to leave municipal park); Lombard v. Louisiana, 373 U.S. 267 (1963) (tresspass conviction based on city police chief's official command to continue segregated service in private restaurants could not stand); Peterson v. City of Greenville, 373 U.S. 244 (1963) (trespass conviction invalid when based on ordinance requiring segregation of Negroes in restaurant facilities); Johnson v. Virginia, 373 U.S. 61 (1963) (contempt conviction unconstitutional when based solely upon Negro's refusal to sit in area of courtroom reserved for blacks); Edwards v. South Carolina, 372 U.S. 229 (1963) (conviction of Negroes for breach of the peace by peacefully demonstrating around State House invalid). But minority groups are not free from the restraint of valid nondiscriminatory laws. Civil liberties, the Court said, depend on order, and civil rights advocates who ignore a temporary injunction against assembling on the city streets without a permit may be punished for contempt. Walker v. City of Birmingham, 388 U.S. 307, 316 (1967). "... [N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion." *Id.* at 320-21. Nor may such groups stage demonstrations on non-public property—no matter how appropriate to their message that property might be—after they have been asked to leave. Adderly v. Florida, 385 U.S. 39 (1966). No one has the right to espouse his views "whenever and however and wherever [he] please[s]. *Id.* at 48.

[87] NAACP v. Button, 371 U.S. 415 (1963).

[88] Hunter v. Erickson, 393 U.S. 385 (1969) (city charter required popular referendum only on laws dealing with racial housing); Reitman v. Mulkey, 387 U.S. 369 (1967) (California constitutional amendment protected private discrimination in housing).

[89] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Civil Rights Act of 1866 bars *all* racial discrimination, private as well as public, in the sale or rental of real property).

[90] Loving v. Virginia, 388 U.S. 1 (1967) (people cannot be prevented from marrying solely on the basis of racial classification), McLaughlin v. Florida, 379 U.S. 184 (1964) (statute prohibiting blacks and whites of the opposite sex who are not married to each other from habitually occupying the same room in the nighttime unconstitutional).

[91] Katzenbach v. Morgan, 384 U.S. 641 (1966) (Voting Rights Act of 1965, which provided that anyone who completed the sixth grade in Puerto Rico could not be denied the right to vote because of his inability to read or write English, held to be constitutional as a proper exercise of Congress' power under Sec. 5 of the Fourteenth Amendment, and, thus, the state's literacy requirements were unenforceable to the extent that they were in conflict); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (statute regulating voting procedures so as to enable more blacks to register held to be constitutional); Louisiana v. United States, 380 U.S. 145 (1965) (literacy test used to keep Negroes from voting because of

literacy tests[93] or by gerrymandering voting districts.[94] It also prohibited discrimination against the Negro for jury duty by declaring that a criminal defendant is denied equal protection of the laws if he is indicted by a grand jury or tried by a petit jury from which members of his race are systematically excluded.[95]

Most of the Warren Court decisions were grounded on the Equal Protection Clause of the Fourteenth Amendment. In its effort to eradicate racial discrimination, the Court found that "race" was a suspect classification subject in its application to strict judicial scrutiny and which could not be justified in the absence of a compelling state interest.[96] The Warren Court never found such a compelling state interest.

Considering the impressive amount of territory which the Warren Court covered in this area, it would be difficult for any succeeding Court to greatly expand the outposts of the law that were staked at the end of the Warren Court era. The most that can be said for the Burger Court is that it has not backtracked on the giant strides that the minorities made toward equality during the sixties. It has, for instance, continued to order desegregation,[97] and has prohibited discrimination occurring both in schools[98] and in employment.[99] An unexpected decision even went so far as to prohibit the denial of access to private schools,[100] which may benefit at least the more affluent blacks.

their race held to be unconstitutional); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (complaint alleging that local act which altered shape of city from a square to a twenty-eight-sided figure in order to eliminate Negro voters from city was discriminatory was sufficient to state a cause of action).

[92] Anderson v. Martin, 375 U.S. 399 (1964) (state may not require designation of race of candidates on official ballots).

[93] Louisiana v. United States, 380 U.S. 145 (1965).

[94] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[95] Eubanks v. Louisiana, 356 U.S. 584 (1958).

[96] Although the "strict scrutiny" test was used extensively by the Warren Court, it had been formulated earlier in Korematsu v. United States, 323 U.S. 214 (1944).

[97] *See, e.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (city could not restrict use of recreational facilities to all-white private schools); Keyes v. School District No. 1, 413 U.S. 921 (1973) (de jure segregation in Denver schools to be ended even if not accomplished under cover of statute or state constitution); Wright v. City of Emporia, 407 U.S. 451 (1972) (prohibited city schools from seceeding from county school system in order to avoid desegregation); Board of Education v. Swann, 402 U.S. 43 (1971) (North Carolina statute forbidding the transportation of students for the purpose of creating a racial balance held unconstitutional); Alexander v. Board of Education, 396 U.S. 19 (1969) (delays in integration of schools no longer constitutionally permissible).

[98] *E.g.,* Kinney Kinmon Lau v. Nichols, 414 U.S. 563 (1974) (Civil Rights Act of 1964 requires that non-English speaking Chinese children receive instruction in English in public schools); Norwood v. Harrison, 413 U.S. 455 (1973) (state cannot lend free textbooks to students who attend private schools that discriminate on racial grounds).

[99] *E.g.,* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Civil Rights Act of 1964 precludes use of standardized intelligence tests which discriminate against blacks and which are unrelated to job performance to determine employment advancement).

[100] Runyon v. McCrary, 96 S.Ct. 2586 (1976).

But there has been little further progress for minority groups; the Burger Court has consistently shunned more affirmative efforts to achieve full integration. While the Burger Court has continued to find race a suspect classification, it has managed to hold the line by failing to find the state action necessary to support a claim of unconstitutional discrimination in cases where the state did not act directly to cause or condone it.

In regard to the racially segregated school systems, the Burger Court has not required suburban school districts to be combined with those of the core city in order to achieve complete integration. *Bradley v. School Board*[101] affirmed the decision of the Court of Appeals that city schools need not be integrated with those of adjacent counties. *Milliken v. Bradley*[102] went further, holding that the district court exceeded its equitable powers when it ordered inter-district school busing to eliminate de jure segregation in the Detroit schools. The rationale for the latter decision was that since there was no showing that the segregation in the inner city schools was related to or caused by racially discriminatory governmental policies in the suburban school districts, the court had no jurisdiction to fashion an interdistrict remedy.

Although the argument that districts that have not actively pursued segregationist policies should not be "punished' for someone's else's wrongdoing appears at least superficially to be plausible, the existing school district lines may have been given by the Court an unduly weighty significance. In his dissenting opinion in *Milliken,* Justice Douglas pointed out that:

> Metropolitan treatment of metropolitan problems is commonplace. If this were a sewage problem, or a water problem, or an energy problem, there can be no doubt that Michigan would stay well within federal constitutional bounds if it sought a metropolitan remedy.[103]

Moreover, it is at least debatable whether or not the suburban districts could have been found to have participated in discriminatory practices so as to be subject to the court's jurisdiction. A court that is truly in favor of integration could find that past residential policies and zoning laws are indicative of discriminatory state action,[104] and one might speculate that many suburban communities have participated in some form of racial exclusion. Even if these particular suburbs had not, it was evident that there was de facto area-wide segregation, with the Detroit school containing most of the black students and the suburbs being predominantly white. De facto

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[101] 412 U.S. 92 (1973), *aff'g* 462 F.2d 1058 (4th Cir. 1972).

[102] 418 U.S. 717 (1974).

[103] *Id.* at 758 (1974) (Douglas J., dissenting).

[104] *See, e.g.,* Serrano v. Priest, 5 Cal. 3d 584, 603, 487 P.2d 1241, 1254, 96 Cal. Rptr. 601, 614 (1971) (en banc).

segregation arguably causes the same ill-effects as de jure segregation and therefore should be just as unconstitutional.[105]

Although these recent Supreme Court decisions do not give explicit approval to de facto segregation, they imply that it is not constitutionally prohibited.[106] Consequently, true integration in the big city schools has suffered a set-back[107] and, indeed, may never be achieved.[108] In *Milliken v. Bradley* the district court had found specifically that the plan including the suburbs would be physically easier, more practical and less costly than the most promising intra-district plan.[109] It also found that a Detroit-only plan would be inadequate to remedy the situation.[110]

A year later, in 1976, *Board of Education v. Spangler*[111] further encouraged the creation of homogeneous de facto segregated neighborhoods. In *Spangler* the Court prohibited the lower courts from redrawing the lines of school attendance zones within the city of Pasedena every year in order to maintain a racial balance. Once the lines have been drawn to achieve desegregation, the Court said, the judicial chore has been done, and the court no longer has jurisdiction.[112] The Burger Court found that although the schools became resegregated within two years after the original fixing of the attendance zones, this result was caused by the private actions of individuals moving in and out of neighborhoods and was not the result of any state action. *Spangler* means that even schools within a city district may never be fully integrated if a remedy that has been implemented is

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[105] *See* Keyes v. School District No. 1, 413 U.S. 189, 219-22 (1973) (Powell, J., concurring); Serrano v. Priest, 5 Cal. 3d 584, 602, 487 P.2d 1241, 1253-54, 96 Cal. Rptr. 601, 613-14 (1971) (en banc).

[106] Indeed, the Los Angeles Board of Education made precisely that argument in Crawford v. Board of Education, 17 Cal. 3d 280, P.2d 28, 130 Cal. Rptr. 724 (1976).

[107] *See* Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall J., dissenting).

[108] If this is true, we will have now "advanced" to the point where the black child from a wealthy family may attend a top-rated private school, but the black child from a poorer family is left to contend with the poorer schools that have traditionally been alotted to him. The schools will be "poorer" not only in the sense that they are separate and so engender a feeling of inferiority; they likely will also be "poorer" in the sense that less money will be available to run them. It is no secret that most blacks live in districts with lower property valuations, and in School District v. Rodriguez, 411 U.S. 1 (1973), the Court upheld a state public school financing system that admittedly favored the more affluent school districts. Milliken v. Bradley, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting).

[109] 418 U.S. 717, 767 (White, J., dissenting). The Detroit-only plan would require many more buses and would still leave many schools 75 to 90 percent Black. The district would then become progressively more black as whites leave the city so that their children would not have to attend predominantly black schools. *Id.*

[110] *Id.* at 735 (majority opinion). The decision has affected areas other than Detroit, influencing similar orders in Louisville, Ky.; Hartford, Conn.; Wilmington, Del.; Indianapolis, Ind., Durham, N.C.; Atlanta, Ga.; Grand Rapids, Mich.; Cincinnati, Cleveland, and Dayton, Ohio. *See* Reiblick, *Summary of* 1973 *October Term*, 94 S.Ct. 214 (1975).

[111] 96 S.Ct. 2697 (1976).

[112] *Id.* at 2704.

found to have been successful, even for a very short period, in obtaining a unitary system.

Black children are not the only ones who have suffered disappointments. Their parents have also been denied access to places that white people routinely frequent. In *Moose Lodge No.* 107 *v. Irvis*[113] a black had been invited to dinner at a private club as the guest of a white member. The club refused to serve him. The guest brought an action against the club and the state liquor board under the Civil Rights Act, alleging that the discrimination was state action in violation of the Equal Protection Clause of the Fourteenth Amendment, because the Pennsylvania liquor board had issued the club a state liquor license. The Supreme Court denied relief on the grounds that the mere grant of a liquor license did not sufficiently involve the state in a discriminatory practice so as to support a claim. If it had wanted to, it appears that the Court could easily have found the requisite state action.[114]

When the post-1969 decisions affecting minorities are examined as a whole, it is obvious that the Burger Court has eschewed venturing into uncharted territory. Whether the Court is motivated by a feeling that the public is not ready for any more pressure in this area or by a desire to preserve the status quo or by judicial conservatism, the result is the same: the Supreme Court of the United States is no longer the place to look for social change. Some state courts *have* made the progression and have insulated their decisions from possible reversal by relying on state grounds.[115] But because the Burger Court has merely refused to extend the Warren Court decisions—rather than to cut back on them, as it did in the field of criminal procedure—there has been less reason for independent state activity in this area.

C. *Equal Protection of the Poor*

Our economy has developed by relying primarily on capitalistic principles, the central tenet of which is that the free market is the most efficient mechanism for the pricing and allocation of goods and services, with a corrollary being that the distribution of wealth is determined by the total of these market interchanges.

Not only do we not inveigh generally against unequal distribution of income or full-cost pricing for most goods, we usually regard it as both

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[113] 407 U.S. 163 (1972).

[114] 407 U.S. at 184 (Brennan, J., dissenting). *Cf.* Burton v. Parking Authority, 365 U.S. 715 (1961) (state implicated in discrimination when it owned building, part of which restaurant leased, and so could have required restaurant to operate on racially non-discriminatory basis).

[115] *See* text accompanying notes 210-21, 230 and 246 *infra.*

> the fairest and most efficient arrangement to require each consumer to pay the full market price of what he consumes, limiting his consumption to what his income permits.[116]

Because of this deeply engrained national philosophy, it is hardly surprising that the Supreme Court has moved slowly in granting rights to indigents.

In dealing with the problem of the poor, the Warren Court first recognized injustices resulting from unequal wealth in the field of criminal procedure. Soon after Earl Warren began leading the Court, it declared that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court,' "[117] and that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[118] In applying this principle, the Warren Court decided that indigents must be provided with free trial transcripts if such are required to appeal a convition,[119] whether or not the trial court deems the alleged errors to be "frivolous".[120] The Court later recognized that the noble ideal of equal justice cannot be realized, "if the poor man charged with crime has to face his accusers without a lawyer to assist him."[121] Thus, states were required to provide counsel for those charged with felonies if they could not afford to pay for a lawyer themselves.[122] The right to assistance of counsel, regardless of one's ability to pay, was extended to the pre-trial situation of custodial interrogation[123] and the post-trial situation where a first appeal is granted as a matter of right from a criminal conviction.[124] The Court based these decisions on the Equal Protection Clause of the Fourteenth Amendment; in the eyes of the Warren Court these rights were so fundamental that the state could not abridge them in the absence of a compelling interest.

Such decisions perhaps came more easily to the Court because they fit in naturally with the multitude of cases dealing with the rights of the criminally accused in general. But in its later years the Warren Court handed down two decisions indicating that discrimination against the poor may be unconstitutional in other areas of life as well. In *Harper v. Board of Elec-*

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[116] Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 28 (1969).

[117] Griffin v. Illinois, 351 U.S. 12, 17 (1956) (plurality opinion), *quoting* Chambers v. Florida, 309 U.S. 227, 241 (1940).

[118] *Id.* at 19.

[119] *Id.*

[120] Draper v. Washington, 372 U.S. 487 (1963).

[121] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[122] *Id.*

[123] Miranda v. Arizona, 384 U.S. 436 (1966).

[124] Douglas v. California, 372 U.S. 353 (1963).

tions[125] the payment of poll taxes as a prerequisite to voting in a state or local election was held to be unconstitutional. The Court based its decision on the premise that the right to vote was a fundamental one, but it also commented that "[l]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[126] Similarly, while *Shapiro v. Thompson*[127] held that a one-year state or county residency requirement could not be imposed on welfare recipients because it impermissibly restricted the right to travel—and did not depend on the Equal Protection Clause—the majority opinion buttressed its decision by noting that the case involved benefits upon which many families depend to provide "food, shelter, and other necessities of life."[128] The dicta in *Harper* and *Shapiro* could be read to imply that "wealth" might be another suspect classification and that other "fundamental interests" might be found.[129] These comments led the poor to anticipate that there would be further steps taken toward the elimination of economic inequalities. This is to some extent evidenced by the fact that organizations which advocated the development of welfare rights began to spring up. Also, there was, correspondingly, a dramatic increase in litigation on behalf of the poor. Almost certainly the indigent would have won some important victories if the Warren Court had still been deciding the cases that came up to the Supreme Court.[130]

It would be unfair as well as untrue to say that the Burger Court has consistently ruled against the poor. For example, the Court has not retreated from the strong stance that the Warren Court took on the rights of indigent criminal suspects,[131] and it has continued to strike down the financial

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[125] 383 U.S. 663 (1966).

[126] *Id.* at 668. Because poll taxes in federal elections had been made unconstitutional by the Twenty-fourth Amendment, and only four states retained them on a local level, the case had more impact because of this dictum than because of its actual holding.

[127] 394 U.S. 618 (1969).

[128] *Id.* at 627.

[129] *See* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: a Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972).

[130] Several key defeats would have been changed into victories by the change of a single vote. *See, e.g.*, School District v. Rodriguez, 411 U.S. 1 (1973) (wide inter-district disparities in per-pupil expenditures does not violate equal protection) (5-4 decision); United States v. Kras, 409 U.S. 434 (1973) (indigents can be required to pay statutory minimum fee for discharge in bankruptcy) (5-4 decision); Richardson v. Belcher, 404 U.S. 78 (1971) (social security disability payments may be offset by stateworkmen's compensation benefits) (4-3 decision).

[131] *See, e.g.*, James v. Strange, 407 U.S. 128 (1972) (indigent defendant could not be required to repay state for cost of counsel without the protective exemptions available to other civil judgment debtors); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to assigned counsel extended to any offense for which incarceration possible); Mayer v. City of Chicago, 404 U.S. 189 (1971) (state must provide free transcripts for indigent misdemeanants as well as felons); Williams v. Illinois, 399 U.S. 235, 241 (1970) ("indigent criminal may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense"). *But see* Ross v. Moffit, 417 U.S. 600 (1974) (state

barriers to participation in the electoral process.[132] What the Court has done is to maintain the fundamental rights of the Fourteenth Amendment as that concept was developed in the rulings of the Warren Court; it has refused to extend the concept any further.

A prime example of the Burger Court's refusal to find another fundamental right is *Lindsey v. Normet,*[133] which sustained the state of Oregon's forcible entry and detainer statute. The Court ruled that even if a landlord fails to make repairs on a building that the city has declared unfit for habitation, he may still bring an eviction action against a hapless tenant upon his failure to pay rent. Unless state law provides otherwise, the tenant is not permitted to defend his withholding of rent on the ground that the landlord has failed to fulfill his end of the bargain. The Supreme Court revealed a misunderstanding of the problem in its observation that the tenant was well enough protected in that he could bring a separate action against the landlord and obtain relief in that action.[134] In his dissenting opinion, Justice Douglas pointed out that the poor person may very well lack the funds necessary to institute an independent action, and even if he could, he would have already lost the real essence of the controversy: the right to remain in his home when it is the landlord rather than the tenant who is at fault.[135]

The Burger Court has also declined to find equal educational opportunity a fundamental right. In *School District v. Rodriguez*[136] the Court upheld a school financing system which admittedly favored the affluent districts, concluding that the Texas system was not shown to discriminate against any definable class of "poor" people, and thus, no suspect classification was being infringed upon. Because the Texas school districts were largely dependent on property taxes for revenue, the poorer districts had to tax themselves at a higher rate than did the wealthier districts; in spite of their greater tax burden, they wound up with less to spend per student than did the richer districts. Even so, the Court rejected any claim of unconstitutionality, declaring that the Constitution does not require "absolute equality or

need not provide counsel for indigent on discretionary appeal); Fuller v. Oregon, 417 U.S. 40 (1974) (state can recoup legal expenses to the extent convicted defendant becomes able to repay).

[132] *See, e.g.,* Lubin v. Panish, 415 U.S. 709 (1974) (primary candidate cannot be required to pay fee fixed at a percentage of the salary of the office sought); Bullock v. Carter, 405 U.S. 134 (1972) (candidates for local office cannot be required to pay fee as high as $8,900 to get on the ballot).

[133] 405 U.S. 56 (1972).

[134] *Id.* at 66.

[135] *Id.* at 90 (Douglas, J., dissenting).

[136] 411 U.S. 1 (1973).

precisely equal advantages."[137] In its rejection of the fundamental right claim, the Court noted that "Education . . . is not among the rights afforded explicit protection under our Federal Constitution."[138] It found that the rational relationship test—the usual standard in reviewing a state's social and economic legislation—was the appropriate one to be used in this case, rather than the rigorous "strict scrutiny" standard, because the case involved difficult questions of local taxation, fiscal planning, educational policy, and federalism. A rational relationship was found in that the system encouraged local participation and control. Each district was then free to determine for itself just how much money it wished to spend on education.

The problem with this conclusion is that meaningful options were indeed available to the wealthier districts in the system, but the other districts with a low per-pupil real estate tax base had little or no choice available to them.[139] Moreover, the fundamental importance of education had been recognized by the Court in previous decisions such as *Brown v. Board of Education,*[140] which had stressed the role that basic education plays in the life of the individual, both as a child and later on as an adult. Not only does early education often determine participation in the economic life of our society, it also directly affects the ability of the individual to exercise specifically enumerated Constitutional guarantees.[141]

The Court may be prompted by a variety of different motives when it announces such unsympathetic decisions. It may believe that the Constitution was not meant to be used as a vehicle to restructure society,[142] and that legislatures are better equipped to redress such wide-ranging social ills.[143] It may simply have misconceived the nature of the problems that the less

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[137] *Id.* at 24.

[138] *Id.* at 35.

[139] *Id.* at 64-65, (White, J., dissenting).

[140] 347 U.S. 483, 493-94 (1954).

[141] School District v. Rodriguez, 411 U.S. 1, 111-14 (1973) (Marshall, J., dissenting). The majority opinion responded to Justice Marshall's criticisms by stating that, "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of . . . [an individual's rights to speak and to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short." *Id.* at 36-37.

[142] ". . . [T]he Constitution does not provide judicial remedies for every social and economic ill." Lindsey v. Normet, 405 U.S. 56, 74 (1972). "It is not the province of [the Supreme] Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." School District v. Rodriguez, 411 U.S. 1, 33 (1973).

[143] ". . . [T]he Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. . . ." School District v. Rodriguez, 411 U.S. 1, 41 (1973. ". . . [T]he ultimate solutions [to assure both a higher level of quality and greater uniformity of opportunity] must come from the lawmakers and the democratic pressures of those who elect them." *Id.* at 59.

fortunate must face.[144] Or it may be reflecting a general distrust of the poor.[145] Whatever the motives, the Burger Court has failed to respond to the plight of the poor. Again, because there has been merely a failure to respond, rather than an actual curtailment of rights,[146] there has not been as much state court rejection of Supreme Court decisions in this area as in the field of criminal procedure. Some state courts have, however, taken on the responsibility of providing further relief for the poor.[147]

[144] In United States v. Kras, 409 U.S. 434 (1973), the Court held that indigents were not deprived of any constitutional rights when required to pay a $50 fee to obtain discharge in bankruptcy. The petitioner had filed an affidavit stating that he could not pay the fee even at the rate of $1.28 per week over a six-month period. In his dissenting opinion, Justice Marshall indicated that he thought the majority did not believe the unchallenged affidavit. *Id.* at 458-59. He went on to say:

> It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are.... A pack or two of cigarettes may be, for them, not a routine purchase, but a luxury indulged in only rarely. The desparately poor almost never go to see a movie, which the majority seems to believe is almost a weekly activity. They have more important things to do with their money. ... *Id.* at 460.

[145] In Wyman v. James, 400 U.S. 309 (1971), the Court upheld a welfare agency's ruling that benefits could be conditioned upon a recipient's willingness to allow a caseworker to visit the home. The claimant's assertion of a Fourth Amendment right was rejected on the ground that the visitation program was a reasonable administrative tool. Justice Marshall pointed out in his dissenting opinion that caseworkers usually try to be helpful, but they are also required to do some detective work. In fact, the agency itself asserted that it needed to enter the homes to guard against welfare fraud and child abuse. *Id.* at 339. Justice Marshall then questioned:

> Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? *Id.* at 342.

Justice Douglas pointed out that the danger of fraud is no greater than in the case of other government subsidies. General distrust for those on welfare can be seen by the fact that vast sums are expended for the administration and policing of the AFDC program, while no such need for policing has been seen as necessary when money is given to farmers, airlines, steamship companies and junk mail dealers. *Id.* at 331 (Douglas, J., dissenting).

[146] However, some federal rights that have been developed under the due process clause have actually been curtailed. For example, over the dissent of Chief Justice Burger, who was the only Nixon appointee on the Court at the time, Goldberg v. Kelly, 397 U.S. 254 (1970), held that welfare benefits could not be terminated prior to an evidentiary hearing. Only three years later, when all the new justices were sitting on the Court, Ortwein v. Schwab, 410 U.S. 656 (1973), held that a welfare recipient was not entitled to his day in court following an adverse decision at the hearing if he could not afford to pay the filing fee. In Mathews v. Eldridge, 96 S.Ct. 893 (1976), the Burger Court decided that not even an evidentiary hearing was required before cutting off social security disability payments. The Court distinguished *Kelly* by saying that since disability benefits were not dependent on financial need, the recipient may very well have other funds available to help tide him over while the controversy is pending. *Id.* at 905. The majority admitted that the recipient who did not have other funds available could be in very bad shape; since eligibility depends upon a determination that the beneficiary is "unable to engage in substantial gainful activity' ... there is little possibility that one who is terminated from the program will be able to find even temporary employment to ameliorate the interim loss." *Id.* at 906. Indeed, in the *Eldridge* case the cessation of disability income caused the beneficiary to lose both his home and his furniture, forcing him, his wife and children to sleep in one bed. *Id.* at 910 (Brennan, J., dissenting).

[147] *See* text accompanying notes 210, 233 and 249 *infra.*

II. REACTION OF THE STATE COURTS

The Warren Court played such a dominant role in the civil rights field that the role of state courts in this area was overshadowed. State judges could sit back and avoid unpopular judgments, secure in the knowledge that the Supreme Court would correct any constitutional infringement on individual rights.[148] But under Warren Burger the situation has changed dramatically. In recent years some state courts have interpreted the Federal Constitution as requiring more protection than the Supreme Court has been willing to recognize; the Supreme Court has actually reversed favorable state judgments.[149] Faced with such a situation, "state courts and legislatures are, as a matter of state law, increasingly according protections once provided as Federal rights, but now increasingly depreciated by decisions of [the Supreme] Court."[150] Justice Brennan, who sees the erosion of individual rights as being undesirable, has pointed out that reliance on state, rather than federal, grounds will avoid such reversal by the Supreme Court.[151]

This tactic is effective because the Supreme Court will not review state cases based on state grounds unless a minimum federal standard has been violated.[152] First of all, Congress has restricted the Supreme Court's jurisdiction of review of state cases to those in which a federal question has been presented.[153] Secondly, under our concept of federalism, states are free to impose their own standards as long as they do not infringe on federal rights. Needless to say, there can be no such infringement in a case where state law has granted *greater* protection than required by federal law. If no federal right has been violated, the same judgment could be rendered by the state court again, and the Supreme Court would be in the position of handing down only an advisory opinion.[154]

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[148] *See Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 271, 274 (1973) [hereinafter cited as *Project Report*]

[149] *E.g.*, Michigan v. Mosley, 423 U.S. 96 (1975); Oregon v. Hass, 420 U.S. 714 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); California v. Byers, 402 U.S. 424 (1971); California v. Green, 399 U.S. 149 (1970).

[150] 423 U.S. at 121 (1975) (Brennan, J., dissenting).

[151] *Id.*; United States v. Miller, 96 S.Ct. 1619, 1629 (1976) (Brennan, J., dissenting).

[152] *See, e.g.*, People v. Beavers, 393 Mich. 554, 227 N.W.2d 551, *cert. denied*, 423 U.S. 878 (1975) (decision appeared to rest on adequate state grounds); Indiana v. Adams, 415 U.S. 935 (1974); Pennsylvania v. Platou, 417 U.S. 976 (1974) (certiorari denied upon determination that the judgment was in fact based on state law); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432, *petition for cert. granted*, 414 U.S. 808 (1973) (case remanded for determination of whether judgment rested on state or federal grounds), 455 Pa. 622, 314 A.2d 854 (decision said to be based on state law), *cert. denied*, 417 U.S. 969 (1974); Pennsylvania v. Ware, 406 U.S. 910 (1972) (certiorari vacated since it appeared that judgment rested on adequate state ground); Cooper v. California, 386 U.S. 58, 62 (1967) (since there was no federal constitutional error, the Court would not decide whether the state properly applied the harmless-error rule); Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1964); Minnesota v. National Tea Co., 309 U.S. 551 (1940).

[153] 28 U.S.C. §1257 (1970).

[154] *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945)

The concept of relying on state grounds is not a new one. For a long period in our nation's history the Federal Bill of Rights was held to be inapplicable to the states and was viewed solely as a restraint on the national government.[155] It merely seems new to those of us who have grown up in the era of the Warren Court, which actively formulated national standards and held them to be applicable to the state as well as the federal government. Since the Supreme Court was often more protective of the individual than the state courts, a cry for states' rights in the recent past was to many a call for the repression of individual rights and was something to be avoided. Now that the tables are turned, however, the concept of states' rights can be a very important tool for the civil libertarian.

The Supreme Court itself has encouraged such a trend. In *Lego v. Twomey*[156] the Court held that the question of whether a confession was voluntary, and hence admissible, was to be determined by a preponderance of the evidence in federal courts. It pointed out that, contrary to its own position, many state courts required that a confession would be admissible as evidence only if it were shown to be voluntary beyond a reasonable doubt.[157] It went on to say that "[o]f course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake."[158] The spirit of the Court is reflected also in Justice Powell's statement:

> While the Civil War Amendments altered substantially the balance of our federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment . . . In an age in which empirical study is increasingly relied upon as a foundation for decision making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a laboratory . . . .[159]

Underscoring the point that state courts are henceforth to be the primary guardians of individual rights, the Supreme Court announced this year that a state prisoner no longer has the right to federal habeas corpus relief on the ground that illegally seized evidence was introduced at his trial.[160] The Court noted that state courts, like federal courts, have a con-

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[155] Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833); *See* Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CAL. L. REV. 273, 273-74 (1973) [hereinafter cited as Falk]; *Project Report, supra* note 148, at 276-77.

[156] 404 U.S. 477 (1972).

[157] *Id.* at 479 n.1.

[158] *Id.* at 489. *Accord,* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) (obscenity); Lindsey v. Normet, 405 U.S. 56, 68 (1972) (landlord tenant relations).

[159] Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (Powell, J., concurring).

[160] Stone v. Powell, 96 S.Ct. 3037 (1976).

stitutional obligation to safeguard personal liberties,[161] and that they can be trusted to effectuate Fourth Amendment values.

Two cautionary notes are in order for the lawyer who wishes to avoid having his successful case reversed by the Supreme Court. While both are rather elementary, they have been overlooked. First, an independent state ground must be mentioned; second, the state ground must be adequate.

Michigan v. Mosely[162] is illustrative of the first point. In that case, the Michigan appellate court had ruled that a confession which was elicited upon a second round of interrogation, which began approximately two hours after the criminal suspect had indicated that he did not wish to answer any more questions, was inadmissible. Because the attorney relied solely on federal grounds, the case was reviewable by the Supreme Court. During oral argument before the United States Supreme Court the following colloquy occurred:

Q: Why can't you argue all of this as being contrary to the law and the Constitution of the State of Michigan?

A: I can because we have the same provision in the Michigan Constitution of 1963 as we have in the Fifth Amendment of the Federal Constitution, certainly.

Q: Well, you argued the whole thing before.

A: In the Court of Appeals?

Q: Yes.

A: I really did not touch upon—I predicated my entire argument on the Federal Constitution, I must admit that. I did not mention the equivalent provision of the Michigan Constitution of 1963, although I could have. And I may assure this Court that at every opportunity in the future I shall.

[Laughter]

Q: But you hope you don't have that opportunity in this case.

A: That's right.[163]

The United States Supreme Court subsequently reversed the decision of the Michigan court.

Reliance on the state ground should be explicitly mentioned. Although there are cases where the Supreme Court will remand the case for a determination of whether a state court judgment is based on a federal ground, an

[161] *Id.* at 3051 n. 35.

[162] 423 U.S. 96 (1975).

[163] United States v. Miller, 96 S.Ct. 1619, 1629 n.4 (1976) (Brennan, J., dissenting).

independent state ground, or both,[164] the Court will not always be so kind. In *Oregon v. Hass,*[165] for example, the state court ruled that a confession was inadmissible for impeachment purposes since the suspect had previously indicated a desire to consult with his attorney. The opinion did not indicate whether the decision was based on a state or federal ground, but it discussed a state case as well as *Harris v. New York,*[166] the case which had held that statements obtained in violation of the *Miranda* rules were available to the prosecution for impeachment purposes. Instead of remanding the case to the state court, the Supreme Court simply reversed and held that in light of *Harris* such evidence was available to impeach the credibility of the defendant.

The second requirement is that the state ground relied upon must be an adequate one. It must be broad enough, without reference to the federal question, to sustain the judgment below. It must also be independent of the federal question. Finally, it must be tenable.[167] State courts have found three ways to fulfill these requirements, and thus avoid Supreme Court review. Adequate and independent state grounds may be predicated upon either a state's constitution, statutes or public policy.

A. *Reliance on Parallel Clauses in State Constitutions*

Since most state constitutions contain clauses similar to the Federal Bill of Rights, there is no reason why a state court must rely on the Constitution of the United States to find a protected right. In fact, until recent times it was the "state charters . . . that were conceived as . . . the only line of protection of the individual against the excesses of local officials."[168] While the Supreme Court may enunciate minimum standards to which all the states must comply, the states are nonetheless independently responsible for safeguarding the rights of their citizens.[169] Some states have taken this duty very seriously and have been making their own constitutions work for them when the federal Constitution will not.[170]

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[164] *See, e.g.,* Pennsylvania v. Campana, 414 U.S. 808 (1973); California v. Krivda, 409 U.S. 33, 35 (1972); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197 (1965).

[165] 420 U.S. 714 (1975).

[166] 401 U.S. 222 (1971).

[167] *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421, 429 (1974).

[168] People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975).

[169] *Id.* at 551, 531 P.2d at 1114, 119 Cal. Rptr. at 330.

[170] It may be true that it is intellectually and logically easier to assert that a state constitution has a different meaning if its wording differs from the clause guarananteeing a similar right in the Federal Constitution. However, similarity in wording, or the lack of it, does not appear to make much of a difference in results. For example, in State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974), the Supreme Court of Hawaii construed art. I, § 5 of the Hawaii Constitution, which is essentially identical to the Fourth Amendment, in a way opposed to that in

Several state courts have rejected *Harris v. New York*[171] as a permissible standard. The Supreme Court of California has recently ruled that an exculpatory statement that a defendant had made, after he had been taken into custody and reassured that any statements he made could not be used against him, were not admissible in court for any purpose. The court reasoned:

> If it is known that statements elicited in violation of *Miranda* may nevertheless be introduced at some point in the trial, there would exist no sanction whatever against the use of overbearing interrogatory techniques, at least until the practices approached traditional levels of coercion.[172]

The court discussed *Harris* and other federal cases, but indicated that it would not presume to interpret them as a matter of federal law.[173] It used them solely to determine whether they were persuasive authority for deciding California cases under state law.[174] It reaffirmed the independent nature of the California Constitution and the California courts' "responsibility to separately define and protect the rights of California citizens."[175] Hawaii[176] and Pennsylvania[177] have handed down similar decisions.

United States v. White[178] is another decision that has met with disfavor in at least one state court. In that case the Supreme Court held that testimony regarding an electronically transmitted account of incriminating statements made by a defendant while conversing with a police informant were admis-

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which the United States Supreme Court had construed the Fourth Amendment in a similar fact situation. The Hawaii Supreme Court recognized that its holding resulted "in a divergence of meaning between words which are the same in both the federal and state constitutions," *Id.* at 369 n.6, 520 P.2d at 58 n.6, but justified its decision by stating that:

> . . . [T]he system of federalism envisaged by the United States Constitution tolerates such divergence where the result is *greater* protection of individual rights under state law than under federal law. In this respect, the opinion of the United States Supreme Court on the meaning of the phrase "unreasonable searches and seizures" is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by article I, section 5 of the Hawaii Constitution. *Id.* (citations omitted).

Conversely, a difference in wording between the two constitutions by no means guarantees success. In People v. Henna, II Ill. App. 3d 405, 406, 296 N.E.2d 769, 770 (1973), the Illinois appellate court rejected the notion of any broader protection under the Illinois Constitution, in spite of different wording, by saying that the difference between the federal and state constitutional provisions is "one of semantics rather than substance."

[171] *See* text accompanying note 34-44 *supra.*

[172] People v. Disbrow, 545 P.2d 272, 279, 127 Cal. Rptr. 360, 367 (Cal. 1976).

[173] *Id.* at 277 n.9, 127 Cal. Rptr. at 365 n.9.

[174] *Id.*

[175] *Id.* at 280, 127 Cal. Rptr. at 368.

[176] State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

[177] Commonwealth v. Triplett, 462 Pa. 242, 341 A.2d 62 (1975).

[178] 401 U.S. 745 (1971).

sible. In *People v. Beavers*[179] the Supreme Court of Michigan examined *White,* but found Justice Harlan's dissenting opinion to be more persuasive. The Michigan Court believed that there was a significant distinction between assuming the risk that one's conversation may subsequently be repeated to others, and the risk that the conversation is currently being electronically transmitted to a unknown third party.[180] It was concerned with the average citizen's right to speak freely in private "with the uninhibited spontaneity that is characteristic of our democratic society,"[181] and believed that participant monitoring would continue to be an important investigative tool for law enforcement even if a warrant were required prior to using that technique. The decision was based solely on the Michigan Constitution.[182]

In *State v. Kaluna*[183] the Hawaii Supreme Court rejected *United States v. Robinson,*[184] which had construed the Fourth Amendment as permitting an officer to make a full body search after effecting a custodial arrest for any offense, however minor. The Hawaii Court disagreed with *Robinson's* proposition that an arrestee surrenders all his rights to privacy and held that such searches were impermissible under state law.[185] The Supreme Court of California reached a similar conclusion.[186]

The New Jersey Supreme Court is another state court that has seen fit to limit more severely the situations under which a legal search may occur than has the Supreme Court of the United States. In *Schneckcloth v. Bustamonte*[187] the Burger Court held that while knowledge of a right to refuse consent to search was a factor to be taken into account in determining the validity of the consent, such knowledge was not an indispensable element of an effective consent. Although the New Jersey Court did not go so far as to require the police to advise the suspect of his right to refuse consent, it has held that where the state seeks to justify a search on the basis of consent, it has the burden of showing that the defendant did in fact know of his right to refuse to give permission to the search.[188]

Several state courts have held the state privilege against self-incrimination in higher esteem than has the Burger Court. In *Scott v. State*[189] the

[179] 393 Mich. 554, 227 N.W.2d 511, *cert. denied,* 423 U.S. 878 (1975).
[180] *Id.* at 565, 227 N.W.2d at 515.
[181] *Id.* at 566, 227 N.W.2d at 516.
[182] *Id. Compare* U.S. CONST. amend. IV, *with* MICH. CONST. art. 1, §11.
[183] 55 Hawaii 361, 520 P.2d 51 (1974).
[184] 414 U.S. 218 (1973).
[185] 55 Hawaii 361, 374, 520 P.2d 51, 58-59.
[186] People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. (1975).
[187] 412 U.S. 218 (1973).
[188] State v. Johnson, 68 N.J. 349, 354, 346 A.2d 66, 68 (1975).
[189] 519 P.2d 774 (Alas. 1974).

Supreme Court of Alaska held that the Alaska privilege means that a defendant cannot be required to disclose the names of any alibi witnesses that he plans to use. Four years previously, the Burger Court had reached a contrary result in *Williams v. Florida.*[190] The Alaska Court examined *Williams,* but found its rationale to be unpersuasive. Likewise, the Supreme Judicial Court of Maine found the federal standard enunciated in *Lego v. Twomey,*[191] which permitted confessions to be introduced at trial if their voluntariness were shown by a simple preponderance of the evidence, to be lacking. Its holding in *State v. Collins*[192] declared that the state must prove voluntariness beyond a reasonable doubt in Maine criminal trials.

In applying the privilege against self-incrimination as embodied in their state constitutions, two state courts have rejected *Michigan v. Tucker,*[193] which held that failure to inform a suspect that he had a right to the presence of appointed counsel during interrogation did not bar the admission of evidence resulting from the confession. In *Commonwealth v. Romberger*[194] the Supreme Court of Pennsylvania had reversed a conviction partly based on such a confession. After the Commonwealth petitioned for a writ of certiorari, the United States Supreme Court vacated the order of the Pennsylvania Court and remanded the case for further consideration in view of the *Tucker* decision.[195] On remand, the Pennsylvania Court distinguished *Tucker* and went on to hold that both the privilege against self-incrimination and the right to counsel, as guaranteed by the Pennsylvania Constitution, were violated, and such evidence would have to be excluded at a new trial.[196]

The Wyoming Supreme Court rejected *Tucker* by ignoring it in *Dryden v. State.*[197] In that case the sheriff had obtained an admission from the defendant that he was at the scene of a homicide at the time it was committed. He had not, however, advised the defendant that he had the right to an attorney prior to and during questioning. In reversing the conviction, the court held that even though there was substantial untainted evidence from which to infer guilt, the violation of the Wyoming constitutional right against self-incrimination rendered the judgment void. In finding the violation, it did not mention *Tucker,* but instead looked to *Miranda* as providing guidance

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190 399 U.S. 78 (1970).
191 404 U.S. 477 (1972).
192 297 A.2d 620 (Me. 1972).
193 *See* text accompanying notes 53 & 54 *supra.*
194 454 Pa. 279, 312 A.2d 353 (1973).
195 417 U.S. 964 (1974).
196 347 A.2d 460 (Pa. 1975).
197 535 P.2d 483 (Wyo. 1975).

for construction of the state constitution.[198] In thus insulating its decision from review, the Wyoming Court noted that the "concern for the protection of constitutional rights of an accused is not the peculiar province of the federal courts. The privilege against self-incrimination and the right to advice of counsel are firmly established in this state."[199]

The Michigan Supreme Court has also been more solicitous of an accused's right to counsel. It found federal decisions of *Kirby v. Illinois*[200] and *United States v. Ash*,[201] which denied a criminal suspect the right to counsel at pre-indictment lineups and photographic identification procedures, unacceptable standards for the people of Michigan.[202] It found the need to guard against unfair identification procedures to be great enough to entitle a Michigan defendant to the assistance of counsel at *any* pretrial lineup, regardless of whether the suspect had yet been indicted.

Other states cases indicate a desire to pre-empt the Supreme Court on constitutional questions, at least on a state level, by resting a decision on state grounds before the Supreme Court has had an opportunity to decide the issue. For instance, the California Supreme Court declared that capital punishment violated the state constitution[203] at a time when several cases presenting the identical question on a federal level were pending in the Supreme Court.[204] The same court heeded the warning implicit in *Banker's Association v. Schultz*,[205] which held that a federal statute requiring banks to keep records of their customers' checks and deposit slips was constitutional, by ruling that the California Constitution prohibited law enforcement authorities from obtaining a person's bank records without legal process.[206] That decision meant that the later Supreme Court decision of *United States v. Miller*,[207] which decided the issue the other way, was inapplicable to the inhabitants of California. The Florida Supreme Court has used similar tactics to protect its own residents. In 1972 it found criminal abortion statutes violated the due process clause of the Florida Constitution.[208] The Florida court knew that cases involving the same issue were pending in the United

[198] *Id.* at 491. Pennsylvania has also adopted *Miranda* as a matter of state law. Commonwealth v. Ware, 446 Pa. 52, 284 A.2d 700 (1971).

[199] Dryden v. State, 535 P.2d 483, 491 (Wyo. 1975).

[200] 406 U.S. 682 (1972).

[201] 413 U.S. 300 (1973).

[202] People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974).

[203] People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1973). This decision was soon overruled by constitutional amendment. CAL. CONST. art. I, §27.

[204] *Id.* at 634 n.1, 493 P.2d at 833 n.1, 100 Cal. Rptr. at 155 n.1.

[205] 416 U.S. 21 (1974).

[206] Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

[207] 96 S.Ct. 1619 (1976).

[208] State v. Barquet, 262 So. 2d 431 (Fla. 1972).

States Supreme Court, but consciously insulated its holding from any result that might be reached there.[209]

The subject matter of the state cases discussed above has been concerned with the rights of criminal suspects. The fact that most of the state cases rejecting United States Supreme Court decisions have been concerned with that body of law is explainable on the basis that it is those rights which have been most sharply curtailed by the Burger Court.[210] However, the California Supreme Court has been notable in that it has also been active in the field of education; it has advanced the rights of both minority groups and the poor in their struggle to obtain more nearly equal educational opportunities. *Serrano v. Priest*[211] held that the state school financing system which favored the more affluent districts was unconstitutional. In reaching this conclusion the Court found that the system was subject to strict scrutiny because of classifications drawn on the basis of wealth.[212] In addition, the court found that education is a fundamental right, not to be abridged in the absence of a compelling state interest.[213]

The Court went on to find that the system was not necessary to accomplish a compelling state interest. The goal of local administrative control could not justify it, since "[n]o matter how the state decides to finance its system of public education, it can still leave this decision-making power in the hands of local districts."[214] Nor could the system be justified on the ground that it promoted local fiscal choice. The Court pointed out that, instead of increasing choices, the system actually decreased them by depriving the poorer districts of the option to tax themselves into excellence, because their tax rolls would never generate enough revenue.

Since *Serrano* predated *School District v. Rodriguez,*[215] where the United States Supreme Court rejected each of these arguments, *Serrano* cannot properly be called a rejection of a Supreme Court decision—in fact, it is quite the other way around. However, it is still important. Although the case was decided primarily on the court's construction of the Equal Protection Clause of the Fourteenth Amendment, the analysis was also held applicable to the plaintiff's claim under the analogous state constitutional provisions.[216]

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[209] *Id.* at 436.

[210] *See* text accompanying notes 34-66 *supra.*

[211] 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (en banc).

[212] *Id.* at 597, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

[213] *Id.* at 604-10, 487 P.2d at 1255-59, 96 Cal. Rptr. at 615-19.

[214] *Id.* at 610, 487 P.2d at 1260, 96 Cal. Rptr. 620.

[215] 411 U.S. 1 (1973). *See* text accompanying notes 136-38 *supra.*

[216] Serrano v. Priest, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971).

Therefore, *Serrano* continues to be applicable to the California school financing system, in spite of the fact that a similar system had passed muster under the Federal Constitutional in *Rodriguez*. Secondly, the California Supreme Court has continued to use *Serrano* in deciding other state education issues.

The most recent application of *Serrano* occurred in *Crawford v. Board of Education*.[217] In that case the California Supreme Court ruled that the Los Angeles school board had an affirmative duty to alleviate school segregation, regardless of whether the segregation was de facto or de jure in nature. The court rejected the implications present in *Milliken v. Bradley*[218] and *Board of Education v. Spangler*[219] that de facto segregation may be constitutionally permissible.[220] Relying on *Serrano*, the court said:

> . . . [T]he "fundamental" nature of the right to an equal education derives in large part from the crucial role that education plays in "preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. . . . [T]he public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of society." . . . Given the fundamental importance of education, particularly to minority children, and the distinctive racial harm traditionally inflicted by segregated education, a school board bears an obligation, under article I, section 7, subdivision (a) of the California Constitution, mandating the equal protection of the laws, to attempt to alleviate segregated education and its harmful consequences, *even if such segregation results from the application of a facially neutral state policy*.[221]

Decisions such as these are not commonplace, but the list of them continues to grow. They indicate that some state courts, with the aid of counsel, are rediscovering and breathing new life into their own constitutions. No longer are they content to sit back and wait for the latest pronouncement from the United States Supreme Court. Rather, they are construing state constitutional provisions in a way that seems best to protect the interests of their own people—and in many cases these constructions are guarantying broader personal liberties than the Burger Court when it has dealt with similarly worded clauses of the federal Constitutional in analogous contexts.

B. *Reliance on State Statutes*

If there is a state statute relating to the issue involved, state courts can ground their decisions on it. This approach requires construction of neither

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[217] 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).

[218] 418 U.S. 717 (1974). *See* text accompanying notes 102-10 *supra*.

[219] 96 S.Ct. 2697 (1976). *See* text accompanying notes 111-12 *supra*.

[220] Crawford v. Board of Education, 551 P.2d 28, 33, 130 Cal. Rptr. 724, 729 (Cal. 1976).

[221] *Id.* at 39, 130 Cal. Rptr. at 735 (emphasis added).

state nor federal constitutions and completely avoids Supreme Court review because of the absence of a federal question.

An example of a case where this technique has been used is *State ex rel. Arnold v. County Court.*[222] In that case, the Supreme Court of Wisconsin noted that the admission at trial of a recorded conversation involving a defendant who was unaware of the monitoring did not violate any Fourth Amendment right. *United States v. White*[223] had determined that issue in favor of the law enforcement officials only two months before. Nevertheless, the Wisconsin Court decided that the evidence was inadmissible under the Wisconsin Electronic Surveillance Control Law,[224] at least as part of the prosection's case-in-chief.

In *Butler v. State*[225] the Texas Court of Criminal Appeals interpreted a state statute in a way that avoided the effect of *Harris v. New York,*[226] which allows otherwise inadmissible statements to be used for impeachment purposes. The court said that the legislature had evidenced a policy of excluding such evidence on the basis that such "extra-judicial oral confessions are generally unreliable."[227] The logic of *Harris,* which rests on the proposition that the reliability of such statements is not necessarily impaired, cannot apply to Texas trials, since there has been a state statutory determination that such evidence *is* untrustworthy.[228]

The Pennsylvania Supreme Court has also construed a state statute to reach a result opposed to that reached by the Burger Court. After the federal Supreme Court determined that a black who had been denied service at a Moose Lodge solely on the basis of race did not have a valid claim under the Civil Rights Act,[229] the Supreme Court of Pennsylvania held that the same club was prohibited from practicing such discrimination by virtue of the state's public accommodation law.[230] Since the lodge had a practice of opening its bar and dining room to non-members, as long as they were of the Caucasian race and were accompanied by a member, the court rejected the lodge's defense that the facilities were private.

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222 51 Wis. 2d 434, 187 N.W.2d 354 (1971).

223 401 U.S. 745 (1971).

224 WIS. STAT. ANN. §§968.27-.33 (1971).

225 493 S.W.2d 190 (Tex. Crim. App. 1973).

226 401 U.S. 222 (1971). *See* Text accompanying note 34-44 *supra.*

227 Butler v. State, 493 S.W.2d 190, 193 (Tex. Crim. App. 1973), *construing* TEX. CODE CRIM. PRO. ANN. arts. 38.21, 38.22 (Vernon 1966).

228 *Id.* at 197.

229 Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

230 Human Relations Comm'n v. Moose Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972), *construing* PA. STAT. ANN. tit. 43, §§951-55 (1964).

Other state courts have construed their statutes to permit a tenant to assert a defense of retaliatory eviction to a forcible entry and detainer action. In *Lindsey v. Normet*[231] the Burger Court had said that nothing in the Federal Constitution prevents a state from passing a law limiting the available defenses in such action to the right of possession. However, in construing the Illinois forcible entry and detainer statute,[232] *Clore v. Fredman*[233] held that although only matters germane to the distinctive purpose of the action could be introduced as defenses, the assertion that the action was instigated as a result of the tenant's complaints to governmental authorities in regard to housing code violations *is* a germane matter. Otherwise, the intent of the retaliatory eviction statute, which forbids the termination of a lease on account of a tenant's report to the authorities, would be nullified. In reaching the same result, the Supreme Court of Minnesota noted the purpose of the statute was to prevent frustration of legislative efforts to ensure adequate housing by forcing the tenant to remain silent in the face of violations because he has nowhere else to go.[234]

Of course, such a tactic requires the existence of a statute. If pertinent legislation is not already in existence, public recation to the more restrictive Burger Court decisions may stimulate enactment of appropriate statutes. For instance, the Florida legislature reacted to *Gustafson v. Florida*,[235] which upheld a full search based on an arrest for failure to carry a driver's license, by enacting a statute which decriminalized almost all traffic offenses.[236] Since the Florida police cannot now make a custodial arrest for this minor offense, the question of a search pursuant to an arrest in such situations simply does not arise.[237]

C. *Reliance on State Public Policy*

Another basis for adequate and independent state grounds may be found in the enunciation of state public policy. Several courts have used

[231] 405 U.S. 56 (1972). *See* text accompanying notes 133-34 *supra.*

[232] ILL. ANN. STAT. ch. 80, §71 (Smith-Hurd 1971).

[233] 59 Ill. 2d 20, 319 N.E.2d 18 (1974). Prior to Lindsey v. Normet, other courts had used a variety of methods to protect tenants by allowing them to assert defenses in an eviction action. *See, e.g.,* McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (violation of First and Fourteenth Amendments); Edwards v. Habib, 130 D.C. App. 126, 397 F.2d 687 (1968), *cert. denied,* 393 U.S. 1016 (1969) (statutory construction); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970) (statutory construction); E. & E. Newman, Inc. v. Hallock, 116 N.J. Super. 220, 281 A.2d 544 (1971) (violation of Fourteenth Amendment). After *Lindsey,* however, the constitutional argument may be advanced to a state court only in regard to its construction of a state constitution, but if the state does have protective housing statutes, the statutory argument appears to be the best one.

[234] Parkin v. Fitzgerald, 240 N.W.2d 828 (Minn. 1976).

[235] 414 U.S. 260 (1973).

[236] Ch. 74-377, (1974) Laws of Florida 1187.

[237] *See* Wilkes, *More on the New Federalism in Criminal Procedure,* 63 KY. L. J. 873, 877 n.20 (1975).

this method to evade reversal by the Burger Court. In *Commonwealth v. Campana*[238] the Pennsylvania Supreme Court held, in a rather opaque decision, that the "same transaction" test applied to claims of double jeopardy and that joinder of all criminal offenses based on the same conduct is required, if the offenses are known to the prosecutor at the time of the first trial. Such a standard prevents the state from conducting multiple trials, each confined to a single offense out of the several that the defendant is charged with, in an attempt to secure a conviction at a later trial if the defendant is acquitted the first time around. The Burger Court had declined to adopt this more protective standard in *Ashe v. Swenson*.[239] When the case came up for review, the Supreme Court granted the prosecutor's petition for writ of certiorari, but remanded the case for a determination of whether the Pennsylvania Supreme Court based its judgment on federal or state constitutional grounds, or both.[240] On remand, the Supreme Court of Pennsylvania held that its decision was based on state law pursuant to the court's supervisory powers.[241] The United States Supreme Court subsequently denied certiorari.[242]

The California Supreme Court has also relied on state public policy to secure individual rights that might be denied by the Burger Court. In *People v. Vickers*[243] the court held that state public policy mandated the right to counsel at probation hearings, and thus avoided a confrontation with the federal Supreme Court, which had expressly left the question unanswered in *Morrissey v. Brewer*.[244]

The Supreme Judicial Court of Maine declined to follow the Burger Court in its ruling that the mere issuance of a liquor license to a private club did not sufficiently implicate the state in the racial discrimination against a black who was refused service there.[245] In *Elks Lodge No. 2043 v. Ingraham*[246] the state liquor board had denied a liquor license to such a club. The club contended that the members' constitutional right of free association had been violated. The Maine Court denied the claim on the ground, among others, that the requirement of racial nondiscrimination to obtain a liquor license was justified since the state had a legitimate interest in discourag-

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238 452 Pa. 233, 304 A.2d 432 (1973).

239 397 U.S. 436 (1970).

240 414 U.S. 808 (1973).

241 455 Pa. 622, 314 A.2d 854 (1974).

242 417 U.S. 969 (1974).

243 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).

244 408 U.S. 471 (1972) (state must afford an individual some opportunity to be heard prior to revoking his parole, but question of whether the parolee is entitled to the assistance of counsel at the hearing was left undecided).

245 Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

246 297 A.2d 607 (Me. 1972).

ing racial bias and avoiding the appearance of acquiescence in any such discrimination.[247]

Grounding a decision on public policy may be helpful in that it avoids unnecessary construction of any constitution, whether state or federal. More importantly, it may be the only tool available in some situations. Not all state constitutions have provisions which correspond to the Federal Bill of Rights. New Jersey, for instance, is one of the few states that has no constitutional clause guarantying the privilege against self-incrimination. Nevertheless, the Supreme Court of New Jersey has recognized such a privilege as rooted in the common law.[248]

This reliance on public policy also fills a gap when there are no applicable statutes in existence. In the absence of a definitive position by either the legislature or the Court of Appeals, a lower New York court was able to provide more adequate relief for tenants by relying on public policy. In *Markese v. Cooper*[249] the court held that a summary eviction proceeding could not be used by a landlord to penalize a tenant for reporting housing code violations. In that case, the tenant had evidently been a satisfactory tenant for three years, but when she reported vermin and rodent infestation, lack of heat, peeling lead paint, a flooded cellar, broken and rotted windows, and deteriorated front steps to the housing authority, the landlord brought an eviction action against her. To award the landlord a judgment, the court said, would "frustrate the strong public policy of maintaining decent housing in New York State."[250] The court recognized that *Lindsey v. Normet*[251] had held that a limitation placed on litigable issues in an eviction action does not violate due process, but maintained that *Lindsey* would not aid the landlord here because the New York law is not merely procedural[252] in nature.

CONCLUSION

When compared to its predecessor, the record of the Burger Court in fostering the protection of civil rights is disappointing. Overall, it has lowered the national standard that the states are required as a minimum to live up to. Except in cases which it has seen as being fundamentally unfair to the

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[247] *Id.* at 616.

[248] *E.g.*, King v. South Jersey National Bank, 66 N.J. 161, 178, 330 A.2d 1, 10 (1974); State v. Fary, 19 N.J. 431, 434, 117 A.2d 499, 501 (1955); State v. Zdanowicz, 69 N.J.L. 619, 622, 55 A. 743, 744 (1903). However, the Supreme Court of New Jersey declined to use this common law privilege as a tool for rejecting *Harris,* even though the argument was presented. State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975).

[249] 70 Misc. 2d 478, 333 N.Y.S.2d 63 (Monroe County Ct. 1972).

[250] *Id.* at 481, 333 N.Y.S.2d at 67.

[251] 405 U.S. 36 (1972).

[252] 70 Misc. 2d at 481, 333 N.Y.S.2d at 67.

criminally accused[253] or as unusually threatening to law-abiding citizens,[254] the Court has consistently favored law enforcement authorities over the individual.[255] It has also denied relief to groups on the outskirts of society by refusing to outlaw what appears to be discriminatory practices.[256] Instead of finding a fundamental interest that must be protected in the absence of a compelling state interest, it has allowed such discrimination to continue if a rational purpose can be found to support it.[257]

While national guidance from the Supreme Court has thus receded into the background, the separate states have been accorded "the independence and freedom that was plainly contemplated by the concept of federalism."[258] It is encouraging to this writer that some state courts have responded to this call to responsibility, and hopefully more will do so as the new legal climate sinks into the consciousness of lawyers and judges around the country.[259]

Even so, state decisions are no substitute for a similar decision coming from the Supreme Court of the United States. In the first place, state decisions will not protect the litigant who is in federal court—often not by his own choice. Secondly, decisions coming from the state courts have a geographically

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[253] *E.g.,* Doyle v. Ohio, 96 S.Ct. 2240 (1976) (due process violated by using a defendant's silence against him after *Miranda* warnings gave rise to an assurance that silence would carry no penalty).

[254] *E.g.,* United States v. United States District Court, 407 U.S. 297 (1972) (electronic surveillance in internal security matters to be undertaken only after securing a warrant).

[255] *See, e.g.,* cases cited notes, 16-19, 68 *supra.*

[256] *See, e.g.,* Board of Education v. Spangler, 96 S. Ct. 2697 (1976) (court has lost jurisdiction once school district lines have been redrawn); Mathews v. Eldridge, 96 S.Ct. 893 (1976) (social security disability benefits may be terminated prior to evidentiary hearing); Independent School District v. Rodriguez, 411 U.S. 1 (1973)) (state may set up school financing system that favors the affluent); United States v. Kras, 409 U.S. 434 (1973) (requirement of bankruptcy filing fee does not violate constitution); Jefferson v. Hackney, 406 U.S. 535 (1972) (state may discriminate in aid it dispenses to welfare recipients); Lindsey v. Normet, 405 U.S. 56 (1972) (state may permit eviction action without defense that landlord failed to maintain habitable premises); Wyman v. James, 400 U.S. 309 (1971) (state may require home visitation in order to qualify for AFDC benefits).

[257] *Project Report, supra* note 148, at 305.

[258] Burger, *The Interdependence of Our Freedoms,* 9 AKRON L.REV. 403, 404 (1976).

[259] Of course, such an achievement will be no easy task. So far, few state courts have shown a willingness to treat state constitutions as independent of the Federal Bill of Rights. Many tend to rely on Supreme Court decisions which have construed the United States Constitution and have regarded such opinions as controlling construction of parallel provisions in state constitutions. People v. Henne, 11 Ill. App.3d 405, 406, 296 N.E.2d 769, 770 (1973) (difference between federal and state constitutional provisions is one of semantics rather than substance); State v. Mecca Twin Theater & Film Exchange, Inc., 82 Wash. 2d 87, 91, 507 P.2d 1165, 1168 (1973) (state constitutional provision will not be construed more broadly than parallel provision in United States Constitution); Falk, *supra* note 155, at 280. Some judges even view such independence as irresponsible, as representing "a refusal to accept accountability for our decisions on federal constitutional law and an unwillingness to leave to the highest federal court the last word on questions of such law." Commonwealth v. Campana, 455 Pa. 622, 631, 314 A.2d 854, 859 (1973) (Pomeroy, J., dissenting).

limited impact. By granting protection to the black, the poor, the political radical and even the despised criminal suspect, the Warren Court raised the nationwide hopes and expectations of groups that had been shunted aside by our society. By applying values of fairness and morality to the concrete problems before it, the Warren Court sought to teach to us all our nation's deepest purpose and meaning.[260] State courts can never fulfill this function of national leadership, and it is this special role that those who admire the Warren Court miss the most.

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[260] *See generally* SIMON, *supra* note 1, at 285-87.